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No. 93-1564

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In the Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF ALASKA, ALASKA ALCOHOLIC BEVERAGE CONTROL BOARD, AND ALASKA HOTEL & RESTAURANT EMPLOYEE TRUST FUNDS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, by requiring state liquor licensees to pay all outstanding state and local taxes as a condition for approval of any transfer of the license, the State of Alaska may obtain priority in the distribution of the proceeds of the sale of the license over a perfected federal tax lien.

2. Whether the sale by the Internal Revenue Service of the taxpayer's interest in a liquor license to which a federal tax lien has attached must be rescinded because state and local tax claims have not been paid in full.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	3
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Aquilino v. *United States*, 363 U.S. 509 (1960)	7
Bavely v. *United States*, 911 F.2d 1168 (6th Cir. 1990), cert. denied *sub nom. Ohio Dep't of Taxation* v. *IRS*, 111 S. Ct. 2815 (1991)	7, 8
Black v. *Cutter Laboratories*, 351 U.S. 292 (1956)	9
Herb v. *Pitcairn*, 324 U.S. 117 (1945)	9
National Bank & Trust Co. v. *United States*, 589 F.2d 1298 (7th Cir. 1978)	4
United States v. *Battley (In re Kimura)*, 969 F.2d 806 (9th Cir. 1992)	6, 7, 11
United States v. *California*, 281 F.2d 726 (9th Cir. 1960)	7
United States v. *Sage*, 566 F.2d 1114 (9th Cir. 1977)	4
United States v. *Stone*, 6 F.3d 581 (9th Cir. 1993)	6-7, 8, 10, 11

Constitution and statutes:

U.S. Const. Amend. XXI	9
Internal Revenue Code (26 U.S.C.):	
§ 6321	2, 3
§ 6323(a)	2
§ 6331	2
§ 6331(a)	2, 3, 10
§ 6331(b)	2, 3, 10, 11

Statutes—Continued: Page

§ 6334 10-11
§ 6335 4
§ 6339(a)(2) 4
28 U.S.C. 1254(1) 8
Alaska Stat. (1993):
§ 04.11.360(4) 4, 5, 6
§ 04.11.360(4)(B) 5
Ariz. Rev. Stat. Ann. § 4-210(A)(5) (1989 & Supp. 1993) . 8
Cal. Bus. & Prof. Code § 24049 (West. 1985) 8
Haw. Rev. Stat. § 281-45(3) (1992) 8
Md. Ann. Code art. 2B, § 74(a)(1) (1993) 8
N.M. Stat. Ann. § 7-1-82(A) (1993) 8
Ohio Rev. Code Ann. § 4303.26(B)(1) (Anderson 1989) 8
Pa. Stat. Ann. tit. 47, § 4-477(d)(3) (Purdon Supp. 1994) 8
R.I. Gen. Laws § 3-5-19 (1987) 8
S.D. Codified Laws Ann. § 35-2-7 (1992) 8

Miscellaneous:

R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* (7th ed. 1993) 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-22) is unpublished, but the decision is noted at 8 F.3d 33 (Table). The opinions of the district court (Pet. App. 1-14, 15-16) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1993. The petition for rehearing was denied on December 16, 1993. The petition for a writ of certiorari was filed on March 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions described at Pet. App. 23-35, the following statutory provisions are involved in this case:

1. 26 U.S.C. 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

2. 26 U.S.C. 6323(a) provides, in relevant part:

> The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment liencreditor until notice thereof * * * has been filed by the Secretary.

3. 26 U.S.C. 6331 provides, in relevant part:

> (a) If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person[.] * * *
>
> (b) * * * In any case in which the Secretary may levy upon property or rights to property, he may

seize and sell such property or rights to property (whether real or personal, tangible or intangible).

* * * * * *

STATEMENT

This case involves the efforts of the United States to satisfy an unpaid federal tax obligation through the seizure and sale of an Alaska liquor license.

1. Marcello and Nancy Quinto operated a bar in Juneau, Alaska, known as the "Office Lounge," for which they held an Alaska liquor license. In 1985 and 1986, the Quintos became delinquent in the payment of taxes arising from the operation of the lounge. In July 1986, the City and Borough of Juneau recorded a notice of tax lien against the Quintos in the amount of $24,854. In September 1986, the Internal Revenue Service made assessments against the Quintos in the amount of $14,390 for unpaid federal employment taxes. Pursuant to Section 6321 of the Internal Revenue Code, a federal tax lien arose at that time against all of the Quintos' "property and rights to property, whether real or personal" (26 U.S.C. 6321). When the assessments went unpaid, notice of the federal tax lien was duly filed in the Juneau Recording District on September 30, 1986. On the same day, the Internal Revenue Service levied upon the Quintos' property pursuant to 26 U.S.C. 6331(a), seizing, among other items, the Quintos' liquor license (Pet. App. 18).

Pursuant to 26 U.S.C. 6331(b), the IRS conducted a public sale of the liquor license by sealed bid in November 1986. The IRS was the only bidder at the sale, purchasing the license for $14,827. The proceeds of the sale were applied to satisfy the Quintos' federal tax liability

(Pet. App. 18). Title to the license thus vested in the United States by operation of law. 26 U.S.C. 6339(a)(2).

In September 1987, the IRS resold the license at a public auction. The successful bidders were John W. Henry and Ira W. Rosen (on behalf of Wayne Entertainment, Inc.), who paid $20,500 to the United States.[1] A certificate of sale was executed by the IRS, transferring "all right, title, and interest of the United States" in the license to Henry and Rosen (Pet. App. 19).

In January 1988, the IRS applied to the Alaska Alcoholic Beverage Control Board (ABC) to transfer the license to Wayne Entertainment. Several creditors of the Office Lounge, including the State of Alaska and the City and Borough of Juneau, filed objections to the transfer under Alaska Stat. § 04.11.360(4) (1993), which requires "all debts or taxes arising from the conduct of the [licensed] business" to be paid before the State will approve any transfer of the license (Pet. App. 19). In

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[1] Juneau asserted that it had been informed by the United States that the City's prior-filed lien of approximately $35,000 was to be paid by the purchaser of the license (Pet. App. 4). The district court mistakenly assumed that this payment by the purchaser was to be from the cash proceeds ($20,500) received by the United States (*id.* at 14 n.7). Instead, the title conveyed to Henry and Rosen by the United States remained subject to the City's prior-filed lien under 26 U.S.C. 6339(a)(2) and therefore remained subject to state lien collection procedures. See, *e.g.*, *United States* v. *Sage*, 566 F.2d 1114, 1114-1115 (9th Cir. 1977) (a tax sale pursuant to 26 U.S.C. 6335 "has no effect whatsoever upon the interest of senior mortgagees"); *National Bank & Trust Co.* v. *United States*, 589 F.2d 1298, 1302-1304 (7th Cir. 1978) (federal tax sale does not take or destroy a senior lien). In reaching their decisions in this case, neither the district court nor the court of appeals relied on the City's contention that it was to be paid from the proceeds of the federal tax sale. Instead, the courts below ordered that sale to be rescinded (Pet. App. 15, 16, 22).

April 1988, the Alaska ABC denied the application to transfer the license to Wayne Entertainment. The agency cited three reasons for its action: (i) the Quintos filed for bankruptcy in December 1986 and the automatic stay resulting from that filing was still in effect; (ii) a previous owner had petitioned to have the license transferred back to her pursuant to Alaska Stat. § 04.11.360(4)(B) (1993); and (iii) the objections filed by the State of Alaska, the City and Borough of Juneau, and other creditors under Alaska Stat. § 04.11.360(4) remained unsatisfied (Pet. App. 20).

2. In November 1989, the United States commenced this action in federal district court seeking (i) a declaration that it was entitled under federal law to transfer the license to Wayne Entertainment, Inc. and (ii) an injunction compelling the ABC to approve the transfer of the license. The district court entered summary judgment against the United States (Pet. App. 1-14).

The court held that, under Alaska Stat. § 04.11.360(4) (1993), the United States could "acquire or transfer its interest in the license only upon satisfaction of creditors' claims" (Pet. App. 10). Upon a motion for reconsideration by the State of Alaska, the court further ordered the sale of the license by the United States to Wayne Entertainment to be rescinded (*id.* at 16), stating, without elaboration, that "no legal foreclosure action has taken place" (*ibid.*). In the same ruling, the court vacated the portion of its prior order that had "decided the priorities among various creditors to the proceeds of the sale of the liquor license" by the United States (*ibid.*).[2]

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[2] The court had earlier ruled that the lien filed by the City and Borough of Juneau was prior in time to the lien of the United States and was therefore entitled to be paid first from the proceeds of the federal tax sale (Pet. App. 13). But see note 1, *supra*. The

3. The court of appeals affirmed (Pet. App. 17-22). In a brief, unpublished opinion, the court relied on its prior decision in *United States* v. *Battley (In re Kimura)*, 969 F.2d 806 (9th Cir. 1992), and on the decision entered by the same panel one week earlier in *United States* v. *Stone*, 6 F.3d 581 (9th Cir. 1993), for the proposition that Alaska may " 'reserve to itself payment of delinquent state or local taxes' from the proceeds of a liquor license transfer" (Pet. App. 21, quoting *United States* v. *Battley (In re Kimura)*, 969 F.2d at 812). The court concluded that the federal lien attached only to the " 'residual' value of the property after such state and local taxes are paid" (*ibid.*). The court therefore held that "when the IRS acquired the license by sealed bid at the first tax sale, whatever it acquired was subject to the State of Alaska's and Juneau's property interest in the taxes owed them" (Pet. App. 21-22). Concluding that the "State of Alaska and City and Borough of Juneau are entitled to assert their interests in the license through the state statutory scheme," the court held that the sale conducted by the United States "was properly rescinded" (*id.* at 22).

ARGUMENT

1. a. Under Alaska law, "all debts or taxes arising from the conduct of the business" must be paid before the State will approve the transfer of a liquor license. Alaska Stat. § 04.11.360(4) (1993). The principal question addressed in this case is identical to the question presented in *United States* v. *Stone*, 6 F.3d 581 (9th Cir.

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court had further ruled that the federal lien was second in time and that the federal claim was therefore to be paid in advance of the claims of the trade creditors and others who objected to the sale under the Alaska statute (Pet. App. 13-14).

1993). In *Stone*, as here (Pet. App. 21), the court of appeals held that state and local tax claims have priority over a preexisting federal tax lien under Alaska law because "the State may validly reserve a property interest in itself to be paid before a state-created liquor license may be transferred" (6 F.3d at 584).[3] The court further held in *Stone*, however, that this same rationale does not permit the State to "reserve" a property interest that would also afford trade creditors with a priority over the federal lien (*ibid.*). See also *United States* v. *Battley (In re Kimura)*, 969 F.2d at 812.

The Ninth Circuit's decisions in *In re Kimura*, *Stone* and this case conflict with the Sixth Circuit's decision in *Bavely* v. *United States*, 911 F.2d 1168 (1990), cert. denied *sub nom. Ohio Dep't of Taxation* v. *IRS*, 111 S. Ct. 2815 (1991).[4] In rejecting Ohio's claim of priority

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[3] The United States has not sought further review of the *Stone* decision because, even under the deferred priority afforded to the federal tax lien by the court of appeals in that case, the claim of the United States will be fully paid from the sale proceeds under the order of distribution entered by the bankruptcy court in related proceedings.

[4] In *Bavely*, the Sixth Circuit noted that its decision was inconsistent with the decision of the Ninth Circuit in *United States* v. *California*, 281 F.2d 726 (1960). See 911 F.2d at 1177. The Ninth Circuit subsequently relied on *California* in reaching its decision in *Stone* (6 F.3d at 583). The United States opposed the State's petition for a writ of certiorari in *Bavely*, however, because the Ninth Circuit decision in *California* was entered "21 days after this Court's decision in [*Aquilino* v. *United States*, 363 U.S. 509 (1960)], with no indication that the court was aware either of the *Aquilino* decision or even of the controversy that gave rise to that decision" (U.S. Br. in Opp. No. 90-772, at 7). The United States suggested at that time that, "[i]n view of the inconsistency between the decision in *United States* v. *California* and this Court's decision in *Aquilino*, it is doubtful whether the Ninth Circuit would, in light of *Aquilino*, follow its earlier decision when a competing federal tax lien was

under a similar state statute (Ohio Rev. Code Ann. § 4303.26(B)(1) (Anderson 1989)), the court concluded in *Bavely* that (911 F.2d at 1173):

> [t]he question is not whether the state has reserved an interest in the license or placed a limitation on the debtor's interest in the license. Rather, the question to be answered is whether the state's debt collection method is a property interest that can be asserted in a bankruptcy proceeding to collect debts owed to the state ahead of payment of a perfected federal tax lien.

Because at least ten States have statutes similar to those of Alaska and Ohio, and for the reasons set forth in the contingent cross-petition filed by the United States in this case, the conflict underlying the decision in this case is one of recurring national importance.[5]

b. Nonetheless, this case and this petition do not present a proper vehicle for resolution of this important, recurring question. Petitioners fully prevailed in this

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involved" (*id.* at 8). "Until the Ninth Circuit, while acknowledging *Aquilino*, follows *United States* v. *California* and subordinates a perfected federal tax lien, we believe that there is no conflict with the decision of the Sixth Circuit in [*Bavely*]" (*ibid.*). In *Stone* and in the present case, the Ninth Circuit has established the conflict that was thought, or hoped, to be lacking when *Bavely* was presented to the Court. See 6 F.3d at 583.

[5] See Ariz. Rev. Stat. Ann. § 4-210(A)(5) (1989 & Supp. 1993); Cal. Bus. & Prof. Code § 24049 (West 1985); Haw. Rev. Stat. § 281-45(3) (1992); Md. Ann. Code art. 2B, § 74(a)(1) (1993); N.M. Stat. Ann. § 7-1-82(A) (1993); Pa. Stat. Ann. tit. 47, § 4-477(d)(3) (Supp. 1994); R.I. Gen. Laws § 3-5-19 (1987); S.D. Codified Laws Ann. § 35-2-7 (1992).

case and therefore lack an adequate basis for obtaining further review.[6]

As the petition accurately recounts, "the District Court entered an order in favor of the State of Alaska, City and Borough of Juneau, the Pension Trust Fund and other parties" and against the United States (Pet. 5). Petitioner further correctly notes that, "[o]n appeal to the Ninth Circuit, the court affirmed" that judgment (Pet. 6). While petitioners thus acknowledge that they fully prevailed in the lower courts on the government's claims (and filed no counterclaim), they seek further review to address what they contend was a defect in the *reasoning*, not the *result*, of that decision. Petitioners contend (Pet. 15-23) that the court of appeals should have relied on the Twenty-First Amendment to the Constitution, rather than on property law concepts, in entering judgment in the State's favor. "This Court, however, reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). See also *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) ("our power is to correct wrong judgments, not to revise opinions"). The fact that petitioners desire to prevail under a different rationale than the court of appeals adopted is not a proper basis for further review.

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[6] 28 U.S.C. 1254(1) affords jurisdiction in this Court for the review by "any party" of a decision of a court of appeals. That language may be broad enough to encompass the party who prevailed in the court of appeals (R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 45 (7th ed. 1993)):

> But while some prevailing parties have attempted to petition for certiorari, there appears to be no recorded instance where the Court has * * * granted a petition filed by a party who prevailed on the merits in the court of appeals.

Petitioners also contend (Pet. 7-15) that the court of appeals should have concluded that the claims of trade creditors, as well as the claims of the State, have precedence over the tax lien of the United States. While the court of appeals addressed that issue in *United States* v. *Stone*, 6 F.3d at 583, that issue was not reached in this case. The district court expressly declined in this case to rule on "the priorities among various creditors to the proceeds of the sale of the liquor license" by the United States (Pet. App. 16). Instead, the court "rescinded" that sale (*ibid.*). The court of appeals similarly "rescinded" the sale, directing the parties "to assert their interests in the license through the state statutory scheme" (*id.* at 22). While the court of appeals noted in a footnote that its prior decisions establish that "Alaska may not validly reserve to third-party trade creditors the right to be paid ahead of a federal tax lien" (*id.* at 22 n.3), that notation was not necessary to its holding in this case that the sale of the license by the United States should be "rescinded" (*id.* at 22).

2. The remedial issue that was actually presented and decided in this case was seemingly addressed as an afterthought in both of the courts below. That issue is whether, pursuant to 26 U.S.C. 6331(b), the United States, having validly seized the interest owned by a defaulting taxpayer in a state liquor license, may then sell the taxpayer's interest in the license (however that interest may be characterized). By "rescind[ing]" the sale conducted by the United States in this case (Pet. App. 16, 22), both of the courts below failed to consider or address the provisions of federal law that expressly authorize the Treasury to "seize and sell" all "property and rights to property" owned by a defaulting taxpayer that are not exempt from levy "under section 6334" of the Internal Revenue Code (see 26 U.S.C. 6331(a) and (b)). Section

6334 provides no exemption for state liquor licenses. 26 U.S.C. 6334. Since there is no doubt that the taxpayers' interest in the liquor license is an interest in "property" (see, *e.g.*, *United States* v. *Stone*, 6 F.3d at 583-584; *United States* v. *Battley (In re Kimura)*, 969 F.2d at 811), there should also be no doubt that the United States, having validly seized that interest, may then "sell" the interest pursuant to 26 U.S.C. 6331(b).

Although the cursory disposition of this question in the courts below is troubling, this issue was not squarely addressed in *In re Kimura*, *Stone* or *Bavely*, all of which involved sales by bankruptcy courts rather than federal foreclosure actions. There is thus no direct conflict on this aspect of the decision in this case. Accordingly, while we disagree with the court's holding, we have not sought review of the remedial question on which this case ultimately turns. If, however, the Court were to accept review and reverse the court of appeals on the first question presented, we submit (for the reasons described in the cross-petition that we have filed) that it would then be appropriate for the case to be remanded to the court of appeals for its initial consideration of the remedial question in light of the Court's determination of the parties' respective substantive rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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